IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 871

LANDON V. BUTLER, *Petitioner*

v.

UNITED STATES OF AMERICA

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Petitioner has contended that, by refusing to grant his various protective motions, the trial court failed to assure the jury "most favorable to an impartial trial", and thus violated the Federal standard for jury selection, as enunciated in 28 U.S.C. § 1865(a). The wording of this statute directed acquiescence in at least the motion to restrict the venire to the counties unaffected by the events of the case. The government has made two answers to this argument. First, that § 1865(a) is not mandatory, and second, "that petitioner did not in his pre-trial motion rely on, or even

call the court's attention to, the provision now invoked which so far as it appears, he urged for the first time on appeal." (Brief in Opposition, pp. 16-17.)

The short answer to the government's first contention is that the word "shall", which appears in 28 U.S.C. § 1865(a), is usually construed as mandatory. See *Thiel* v. *Southern Pacific Company*, 328 U.S. 217, 220-21 (1946), in which this Court said, in speaking of the statutes regulating Federal jury selection: "The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers. This discretion, of course, *must be guided* by pertinent statutory provisions." The Court then pointed out that Federal jurors "*must* be returned from such parts of the district as the court may direct so as to be most favorable to an impartial trial", (emphasis supplied) and quoted 28 U.S.C. § 1865(a).

Whether the statute is mandatory or a powerfully phrased guide to discretion does not, however, matter to petitioner's argument. Certainly, the statute's "shall" language is a significant Congressional directive on the issue of Federal jury selection. It strongly suggests that the Federal standard is not to be a minimal one of checking the actual performance of a jury, but that every step must be taken at the outset to assure the fairest possible jury.

The government's second argument does not deny that the extensive protective motions and the oral arguments presented fully the factors which would detract from the impartiality of a trial in Cape Girardeau, especially if the jury was selected from the farming counties affected by the case. Since the factual

issues were completely presented to the trial court, the omission of a particular statutory citation is without legal significance. It might even be presumed that a district court which deals in almost every case with the standards for jury selection would be presumed to know the applicable statutes. In *Yorkshire Insurance Company* v. *United States,* 171 F. 2d 374 (3d Cir. 1948), *affirmed* 338 U.S. 366 (1949), the fact that a procedural rule relied upon by a defendant to sustain the judgment in his favor was asserted for the first time upon the appeal did not prevent its consideration by the Court of Appeals. See also *Maxwell* v. *United States,* 334 F. 2d 181 (5th Cir. 1964) in which appellant relied very heavily upon a point which had been little litigated in the trial court. The Court of Appeals said:

> "It is true that appellant may not raise issues on appeal which were not raised below . . . but the rule is different where the question is fairly put in issue by the pleadings and proofs and is not abandoned. Cf. Chase Manhattan Bank v. Commissioner (5th Cir. 1958), 259 F.2d 231. There may have been a soft-pedalling of the issue in the court below but it fell short of abandonment."

The situation here is analogous to the cases in which the trial court has applied the wrong state law in conflict situations. When this occurs, an Appeals Court on its own motion, or when the issue is raised for the first time to it, will remand the case for a new trial and the application of the correct rule of law. See *United States* v. *Malphurs,* 316 U.S. 1 (1942). See also *United States* v. *Certain Parcels of Land, etc.,* 144 F. 2d 626, 630 (3d Cir. 1944). The instant situation is, of course, far less extreme since the factual

basis and the arguments in the trial court were moulded to the correct rule of law.

Finally, since the government failed to object in its ample Court of Appeals Brief to appellant's citation of the law, it has, on familiar principle, waived that objection here. Compare *Fleishhacker* v. *Blum,* 109 F. 2d 543 (9th Cir. 1940), in which the Court of Appeals rightly said that though the pleadings below had not specifically framed the issue then before it "since the parties have assumed that the question is properly before us, we will consider and decide it." 109 F. 2d 548.

Petitioner's other contentions and the government's counter-contentions are fully covered in the Petition and Brief in Opposition.

Respectfully submitted,

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February 9, 1966